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86-456

Supreme Court, U.S.
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CLERK

No. 86-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

FAZAL AHMAD,

Petitioner,

vs.

STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT

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QUESTION PRESENTED

1. Whether the petitioner's federally guaranteed rights to the effective assistance of counsel were violated by the trial court's denial of an adjournment to permit counsel to review over 11,000 Medicaid claim forms and 2500 patients' charts, which the prosecution introduced into evidence at the petitioner's State medicaid fraud trial, and by the record evidence of counsel's actual performance which reflected little or no meaningful pretrial preparation as well as nothing but the most perfunctory and superficial efforts to protect against prosecutorial excesses during cross-examination and summation?

LIST OF PARTIES

The parties to the proceedings below were the petitioner Fazal Ahmad and the respondent State of New York.

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The petitioner, Fazal Ahmad, respectfully prays that a Writ of Certiorari be issued to review the order of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, entered in the above-entitled proceeding on June 19, 1986. Leave to appeal to the New York Court of Appeals was denied by Hon. Fritz W. Alexander, II, Associate Judge, on July 23, 1986.

DECISIONS BELOW

The order denying leave to appeal to the New York Court of Appeals (Alexander, J.), has not been reported. It is represented in the Appendix hereto, p. A-1, *infra*.

The order of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, affirming the Judgment of the Supreme Court, New York County (Bradley, J.), convicting the petitioner and imposing sentence, has not been reported. It is reprinted in the Appendix hereto, p. A-2, *infra*.

JURISDICTION

The jurisdiction of this Court to review the order of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, is invoked under 28 U.S.C. Sec. 1257, subd. (3).

CONSTITUTIONAL PROVISIONS INVOLVED

Sixth Amendment:

> "In all criminal prosecutions, the accused shall enjoy the right***to have the Assistance of Counsel for his defense."

Fourteenth Amendment:

> "No State shall***deprive any person of life, liberty, or property without due process of law".

STATEMENT OF THE CASE

FAZAL AHMAD, the petitioner, came to the United States in 1972 from his native Pakistan after he completed his medical training. He thereafter became a citizen of this country; he has a wife, who is also an American citizen, and three American-born children.

Prior to this case, Dr. Ahmad had no contact with the criminal justice system nor was his professional standing in the medical community challenged by any agency responsible for the licensing, supervision, and disciplining of physicians in the State of New York. Indeed, until this case, he had no reason to believe that his medical practice did not meet the ethical standards of his profession as well as the obligations enjoined upon him by the law.

In November 1977, after being licensed by the State of New York to practice medicine, the petitioner was accepted into the New York State Medical Assistance Program (Medicaid) as a provider of medical services and was recognized by Medicaid as a pediatric specialist. Dr. Ahmad's medical practice was primarily located in the Bedford-Stuyvesant section of Brooklyn, New York.

In 1980, the Office of the Deputy Attorney General For Medicaid Fraud Control opened an investigation into the petitioner's medicaid billing practices. Four years later, that investigation resulted in an indictment charging the petitioner with fifty three counts of Offering a False Instrument For Filing in the First Degree (N.Y. Penal Law Sec. 170.35 [McKinney 1975]), one count of Grand Larceny in the Second Degree (N.Y. Penal Law Sec. 155.35 [McKinney 1975]), and one count of Tampering With A Witness in the Fourth Degree (N.Y. Pen Law Sec. 215.10 [McKinney Supp. 1986]). Prior to trial, the court granted the prosecutor's motion to dismiss twenty-one counts of Offering a False Instrument For Filing in the First Degree. The petitioner was ultimately found guilty of the remaining thirty-two counts of Offering a False Instrument For Filing in the First Degree, and Grand Larceny in the Second Degree; the petitioner was found not guilty of Tampering With a Witness in the Fourth Degree.

In essence the theory of the prosecution was that the petitioner had defrauded the State of New York of some $326,000.00 by seeking, and obtaining, compensation for psychiatric services provided as a psychiatric specialist, rather than at the lower rate of compensation as a specialist providing services outside of his field of specialization, and by inflating the amount of time spent by him providing those services to each medicaid recipient. By inflating the amount of time spent, the prosecution contended, the petitioner was paid more than he otherwise would have been entitled to had he accurately stated the time spent in providing those services.

The petitioner has consistently maintained that he did not have the criminal intent necessary for conviction. Stripped to their essentials, the charges against the petitioner were not based on

allegations that no services were provided by him or that be billed Medicaid for persons he did not treat; rather, the charges focused upon the petitioner's choice of procedure codes to bill for services actually provided to bona-fide medicaid recipients. Also significant are the facts that the petitioner was never notified that Medicaid considered his billing practices to be improper and that Medicaid continued to compensate the petitioner at the specialist's rate during the aforementioned four year investigation, notwithstanding that Medicaid was well aware that he was not a recognized psychiatric specialist. It was the petitioner's position that whatever wrongs may have been committed by him were civil in nature, not criminal.

The petitioner's trial counsel was not his original attorney. The court permitted counsel to enter the case shortly before the trial was scheduled to begin based on counsel's representation that he would be ready to proceed in six weeks. As the rescheduled trial date approached, counsel, who was essentially a sole practitioner, requested another adjournment, explaining that he needed more time to prepare. The court denied the request without inquiring of counsel how much additional time was needed. The trial began over counsel's repeated objections. Counsel also admitted that he was not prepared to adequately defend his client.

On appeal to the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, the petitioner argued *inter alia* that he was inadequately represented by counsel. The Appellate Division affirmed without an opinion on June 19, 1986, and leave to appeal to the New York Court of Appeals was denied by Honorable Fritz W. Alexander, II, Associate Judge, on July 23, 1986.

REASON FOR GRANTING THE WRIT

IN LIGHT OF THE ERRONEOUS APPLICATION BY THE APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK, FIRST JUDICIAL DEPARTMENT, OF THE TEST FOR INEFFECTIVE ASSISTANCE OF COUNSEL ANNOUNCED BY THIS COURT IN *STRICKLAND V. WASHINGTON* (466 U.S. 668 [1984]), THE PETITION FOR CERTIORARI SHOULD BE GRANTED.

At the Appellate Division, the petitioner argued *inter alia* that he was denied effective assistance of counsel as a consequence of the court's arbitrary denial of his request for an adjournment of this complex "white collar" case, coupled with the record evidence of counsel's actual (inadequate) performance. We respectfully submit that certiorari to review the Appellate Division's order affirming the conviction without an opinion ought to be granted because of a "doubtful determination" by the court below concerning the fundamental right to the effective assistance of counsel (see *Williams v. Lee*, 358 U.S. 217, 218 [1959]).

In *Strickland v. Washington* (466 U.S. 668, 104 S.Ct. 2052, 2064 [1984]) this Court stated that,

> "A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."

The record in the case at bar discloses that the petitioner's medical practice was investigated over the course of four years

before his indictment was voted and filed, and another year elapsed between indictment and trial. A senior special auditor investigator at the Deputy Attorney General's Office, Helen Long, testified that she was responsible for reviewing and analyzing over 11,000 Medicaid invoices submitted by the petitioner, and for arranging the data culled from the invoices in a manner presentable to the jury. Her work on this project, to which she devoted all of her time, spanned some five months and continued until the eve of trial. Ms. Long had a staff of ten people assisting her on this project. At the sentencing the prosecutor disclosed that the audit staff alone spent $46,432 preparing this case for trial and that the cost of retrieving the documents necessary to prosecute this case amounted to some $40,000. Two prosecutors were needed to try this case.

The complexity of the case is demonstrated by the number of witnesses called by the prosecution (23), the number of invoices (11,026) and patient charts of the petitioner (2500) admitted into evidence, three computer printouts explaining the data gathered from the invoices, the number of people needed to gather and organize the information, as well as the number of people needed to prosecute this case, and the time needed to prosecute this case, exclusive of jury selection, summations, and charge.

Defense counsel, who was essentially a sole practitioner, objected to the commencement of the trial, explaining that he did not have sufficient time to prepare. It should be noted that counsel, who was not involved in this case from its inception, was permitted to represent the petitioner beginning in January, 1985, after the petitioner's then-counsel was dismissed. New counsel represented to the court that he would be ready for trial in March. Notwithstanding this representation, counsel was not ready and he requested additional time because he had not been able to review the aforementioned invoices and patient charts, which coincidentally were in the prosecutor's possession. Without inquiring of counsel how much additional time was needed, the court arbitrarily ordered that the trial commence "forthwith" and the case was sent to another Judge for trial.

Testimony in the trial began four days later and continued for some six additional trial days. At several points during the trial, and once during the sentencing, trial counsel advised the court of his objections to proceeding and his unpreparedness.

In the petitioner's view, the court's insistence on proceeding to trial, given the complexity of this case, was "an unreasoning and arbitrary insistence on expeditiousness" (*Morris v. Slappy*, 461 U.S. 1, 13 [1983]), the consequence of which was that counsel was unprepared to adequately defend his client.

Counsel's unpreparedness was demonstrated by his unfamiliarity with the voluminous documentary evidence relied upon by the prosecutor, which documents contained information devastating to the defense.

The petitioner's position at trial was that he did not have the criminal intent necessary to be guilty of defrauding the State. In support of this position, the petitioner argued that what he billed Medicaid for was counselling Medicaid recipients, not psychotherapy as alleged by the prosecution. In his opening, defense counsel stated that his client *never* billed Medicaid for psychotherapy and that the 11,026 Medicaid claim forms submitted by the petitioner would support that contention. However, on cross-examination of the petitioner, the prosecutor was able to establish that on at least fifty occasions the petitioner did in fact bill Medicaid for psychotherapy.

Also as part of his opening remarks, defense counsel argued that this case should have been a civil-not criminal-proceeding, and generously added that his client "certainly owes some money to [the State]. There is no question about that" (R: 193). When cross-examined about counsel's opening, the petitioner disavowed counsel's assertion about owing money to the State.

Poor preparation was also revealed when the prosecutor cross-examined the petitioner about using "white-out" on the Medicaid invoices and on his patient charts. The obvious inference to be drawn from this was that the petitioner was trying to alter these documents, thereby evincing a consciousness of guilt.

The significance of the "white-out" testimony is that after the subject was first raised, defense counsel confessed to the court that "I don't think, frankly this white-out caught me, *I'm going to start going through these charts*" (R: 1742; emphasis added).

Allowing the petitioner to testify without first reviewing the very Medicaid invoices and patient-charts which the prosecution intended to use as evidence at trial was nothing short of recklessness. The disclosure of the petitioner's use of white-out was devastating because the jury did not learn of its use or its significance until the subject was first raised by the prosecutor at or near the end of the cross-examination, the implication being that the defense had attempted to conceal its use by the petitioner from the jury. Of course, being totally unaware that white-out was used on these documents, there was nothing counsel could do to effectively blunt the devastating effects of the untimely disclosure of this evidence.

Finally, by failing to object defense counsel did little to protect his client from prosecutorial excesses during cross-examination of his client and during summation. For example, the prosecutor's cross-examination of the petitioner was an unbridled and lengthy inquisition into his and his wife's personal finances and business transactions-subjects which bore no relevance to the issues presented in this case and which could only have been intended by the prosecutor as an appeal to class prejudice (see *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 239-240 [1940]; *United States v. Stahl*, 616 F.2d 30 [2d Cir. 1980]). In addition, the prosecutor attempted to broadly discredit the petitioner as a person whose foreign medical credentials were questionable in this country and whose interest was not in helping the indigent sick but rather preying upon the very system which was designed to help the indigent sick.

In *Kimmelman v. Morrison* (____ U.S. ____, 91 L.Ed.2d 305 [1986]), this Court concluded that the habeas corpus petitioner had satisfied the incompetence prong of the *Strickland* test where counsel failed to conduct pretrial discovery, notwithstanding that counsel "aggressively" defended the petitioner at trial. No less

than in *Morrison (supra)*, the representation afforded the petitioner in the case at bar was substandard notwithstanding that counsel was able to expose some of the weaknesses in the State's case (see also *United States v. Baynes*, 687 F.2d 659 [3rd Cir. 1982]).

The prejudice to the Petitioner, dependent as the defense was on the jury's willingness to believe the petitioner's testimony that he did not have the requisite criminal intent, is clear. On the basis of the foregoing, the jury could conclude that the petitioner had lied, that the defense had attempted to conceal evidence, and that he did not have a cohesive defense. Whatever was left of the petitioner's credibility was destroyed by the prosecutor's cross-examination and summation.

To conclude, though it is impossible to determine from the Appellate Division's order which of the two requirements announced by this Court in *Strickland (supra)* were not satisfied, it is the petitioner's view that both were met. Counsel's performance at trial, caused by the court's arbitrary denial of his request for additional time, was substandard notwithstanding that his cross-examination of prosecution witnesses was arguably "aggressive" (see *Kimmelman v. Morrison*, 91 L.Ed.2d 305, *supra*). Moreover, the prejudice prong was satisfied in that the petitioner demonstrated the adverse impact counsel's omissions had on the defense. Accordingly the petition should be granted.

CONCLUSION

FOR THE REASONS STATED, WE RESPECTFULLY PRAY THAT A WRIT OF CERTIORARI TO REVIEW THE ORDER OF THE APPELLATE DIVISION OF THE SUPREME COURT, FIRST JUDICIAL DEPARTMENT, BE GRANTED.

Dated: New York, New York
September, 1986

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Counsel for Petitioner

APPENDIX

Court of Appeals
of the
State of New York

BEFORE: HON. FRITZ W. ALEXANDER, II, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

– against –

FAZAL AHMAD,

Appellant.

CORRECTED

CERTIFICATE DENYING LEAVE

I, FRITZ W. ALEXANDER, II, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

APPLICATION FOR A STAY DENIED AS UNNECESSARY.

Dated at New York, New York
July 23, 1986.

/s/ Fritz W. Alexander
Associate Judge

*Description of Order: Order of the Appellate Division, First Department entered on June 19, 1986, affirming the judgment of the Supreme Court, New York County, rendered on May 23, 1985.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on June 19, 1986

Present – Hon. Leonard H. Sandler, Justice Presiding
David Ross
Sidney H. Asch
Arnold L. Fein
E. Leo Milonas, Justices.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

– against –

FAZAL AHMAD,

Defendant-Appellant.

Order of Affirmance on Appeal from Judgment 27293

An appeal having been taken to this Court by the defendant-appellant from the judgment of the Supreme Court, New York County (John Bradley, J.), rendered on May 23, 1985, and said appeal having been argued by Richard E. Mischel of counsel for the appellant, and by Donald H. Zuckerman of counsel for the respondent; and due deliberation having been had thereon,

It is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed. The case is remitted to the Supreme Court, New York County, pursuant to CPL 460.50(5).

ENTER:

HAROLD J. REYNOLDS
Clerk.

Counsel for appellant is referred to § 606.5, Rules of the Appellate Division, First Department.